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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

RIN 0648-BB18

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands
Management Area; Amendment 97

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and
Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of availability of fishery management plan amendment; request
for comments.

SUMMARY: The North Pacific Fishery Management Council submitted Amendment 97 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) to NMFS for review. If approved, Amendment 97 would allow owners of vessels participating in the Amendment 80 Program, known as Amendment 80 vessels, to replace their vessels for any reason at any time. Amendment 97 includes provisions that would limit the length of a replacement vessel, extend Gulf of Alaska groundfish harvest limits known as “sideboards” to replacement vessels, require replacement vessels to meet certain safety standards established by the Coast Guard, and prevent replaced vessels from being used in Federal groundfish fisheries off Alaska other than certain Bering Sea and Aleutian Islands groundfish fisheries. This action is necessary to promote safety-at-sea by allowing Amendment 80 vessels owners to replace aging vessels with newer, larger, and safer vessels and by requiring

replacement vessels to meet certain Coast Guard vessel safety standards, and is intended to provide Amendment 80 vessel owners with the opportunity to increase their retention and utilization of groundfish catch through the ability to expand their vessel's range of processing capabilities. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and other applicable laws.

DATES: Comments on the amendment must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Send comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by NOAA-NMFS-2011-0147, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal at <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NOAA-NMFS-2011-0147 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on that line.
- Fax: Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to (907) 586-7557.
- Mail: Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P. O. Box 21668, Juneau, AK

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- Hand delivery to the Federal Building: Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All Personal Identifying Information (for example, name, address) voluntarily submitted by the commenter will be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for this action may be obtained from <http://www.regulations.gov> or from the Alaska Region website at <http://alaskafisheries.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Seanbob Kelly, 907-586-7228.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that each regional fishery

management council submit any fishery management plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce (Secretary). The Magnuson-Stevens Act also requires that NMFS, upon receiving a fishery management plan amendment, immediately publish a notice in the Federal Register announcing that the amendment is available for public review and comment. This notice announces that proposed Amendment 97 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) is available for public review and comment.

The groundfish fisheries in the exclusive economic zone (EEZ) of the BSAI are managed under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Act. The EA/RIR/IRFA prepared for this action contains a complete description of the alternatives and a comparative analysis of the potential impacts of the alternatives (see ADDRESSES for availability). All of the directly regulated entities would be expected to benefit from this action relative to the status quo because the proposed amendment would enable vessel owners to replace aging vessels with newer, larger, safer, and more efficient vessels.

Amendment 97 would amend FMP provisions related to vessel replacement in the Amendment 80 Program. In June 2006, the Council adopted Amendment 80 to the FMP, which was implemented with a final rule published in 2007 and was fully effective starting with the 2008 fishing year (72 FR 52668, September 14, 2007). Among other measures, Amendment 80 authorized the allocation of specified groundfish species to harvesting cooperatives and established a catch share program for trawl catcher/processors that are not authorized to conduct directed fishing for pollock under

the American Fisheries Act of 1998 (AFA) (Public Law 105-227, Title II of Division C), or non-AFA trawl catcher/processors. Non-AFA trawl catcher/processors are also referred to as Amendment 80 vessels or the Amendment 80 sector. Amendment 80 was intended to meet a number of policy objectives that included improving retention and utilization of fishery resources by the Amendment 80 sector, reducing potential bycatch reduction costs, encouraging fishing practices with lower discard rates, and promoting opportunities for the sector to increase the value of harvested species.

Regulations implementing Amendment 80 limit participation in the Amendment 80 sector to non-AFA trawl catcher/processors that qualified under the definition of the non-AFA trawl catcher processor subsector as defined by section 219(a)(7) of the BSAI Catcher Processor Capacity Reduction Program (CRP), contained within the Department of Commerce and Related Agencies Appropriations Act, 2005 (Pub. Law No. 108-447). The regulations list the 28 non-AFA trawl catcher/processors that meet the criteria laid out in section 219(a)(7) of the CRP. In developing the regulations for Amendment 80, NMFS determined that the language of the CRP prohibited vessels that did not meet the criteria from participating in the Amendment 80 sector. Therefore, only listed vessels were permitted to fish in the Amendment 80 sector and non-qualifying vessels could not be used as replacement vessels. Arctic Sole Seafoods, Inc., the owner of an original qualifying Amendment 80 vessel that was lost, submitted comments on the proposed rule specifically addressing the restriction of participation in the Amendment 80 sector to the listed vessels and the lack of a replacement vessel provision in the regulations. NMFS maintained that Congress had established the eligibility requirements for participation in the Amendment 80 sector through the CRP and the non-AFA trawl catcher/processor

subsector, and that section 219(a)(7) limited participation to the vessels that met the qualifying criteria. NMFS further explained that it could not provide replacement language in the regulations because Congress did not authorize such action. After publication of the final rule, Arctic Sole Seafoods, Inc. challenged NMFS's statutory interpretation of section 219(a)(7), contending that the lack of replacement vessel language was arbitrary and capricious.

On May 19, 2008, the U.S. District Court for the Western District of Washington (Court) issued a decision invalidating those regulatory provisions that limit the vessels used in the Amendment 80 Program to only those vessels meeting the qualification criteria in section 219(a)(7) of the CRP. In Arctic Sole Seafoods, Inc. v. Gutierrez, 622 F.Supp.2d 1050 (W.D. Wash. 2008), the Court found the statutory language of the CRP ambiguous as to whether replacement of qualifying vessels with non-qualifying vessels was permissible, and found the agency's interpretation of the statute to be arbitrary and capricious. The Court concluded that the inability to replace qualifying vessels with non-qualifying vessels would ultimately result in the elimination of the sector through vessel attrition, and that Congress had not intended such an outcome in the CRP. The Court ordered that "[t]o the extent that [regulations] restrict access to the BSAI non-pollock groundfish fishery to qualifying vessels without allowing a qualified owner to replace a lost qualifying vessel with a single substitute vessel, the regulations must be set aside. . . ."

After receiving the Court's decision, NMFS developed an interim policy for vessel replacement in the Amendment 80 sector consistent with the Court's decision. In October 2008, NMFS provided the Council with an overview of the Court Order, the

necessary amendments to the FMP to implement the Court Order, possible alternatives the Council could consider with regard to vessel replacement, and a discussion of other aspects of the Amendment 80 Program that may be affected by vessel replacement, such as the application of Gulf of Alaska (GOA) sideboards to replacement vessels and the assignment of quota share (QS) permits to replacement vessels.

The Council and NMFS recognized the need to clarify the conditions under which an Amendment 80 vessel may be replaced and that any vessel replacement provisions must be consistent with the Court Order, the Capacity Reduction Program, and the Magnuson-Stevens Act. Over the course of several meetings, the Council considered an analysis prepared for the action and public comments regarding the action. At its June 2010 meeting, the Council selected its preferred alternative for vessel replacement and recommended that it be submitted for Secretarial review as Amendment 97 to the FMP.

If approved, Amendment 97 would allow the owner of an Amendment 80 vessel to replace that vessel for any reason and at any time. The Council determined that Amendment 97 is necessary to provide for the replacement of Amendment 80 vessels in a manner that promotes the objectives of Amendment 80, the CRP, and the Magnuson-Stevens Act, to promote safety-at-sea by providing Amendment 80 vessel owners the opportunity to replace aging vessels with newer, larger, more efficient vessels and requiring replacement vessels to meet certain Coast Guard safety standards, and to facilitate the sector's ability to increase its processing capabilities to improve the sector's retention and utilization of groundfish catch.

Amendment 97 would make several modifications to the FMP applicable to replacement vessels and replaced vessels. For replacement vessels, Amendment 97

would authorize Amendment 80 vessel owners to replace an Amendment 80 vessel for any reason and at any time. Amendment 97 would require that up to one replacement vessel be used at any given time and would restrict the length of Amendment 80 replacement vessels to no longer than 295 ft (89.0 m) length overall. The Council considered several length limits, including no length limit, before recommending that NMFS implement a 295 ft (89.9 m) maximum length overall (MLOA) limit for all Amendment 80 replacement vessels. The Council recognized that larger vessels can include facilities able to store large quantities of fish and are able to make value added products like surimi, fillets, and fishmeal in onboard fishmeal plants. The Council also determined that the proposed 295 ft (89.9 m) MLOA would provide equal advantages to each participant in the Amendment 80 sector while improving the ability of the Council and NMFS to analyze and predict the maximum fishery impacts of the Amendment 80 fleet in future actions. If approved, Amendment 97 is intended to demonstrate to the United States Maritime Administration (MARAD) that the Council recommended and NMFS approved conservation and management measures allowing vessels that exceed the limits set forth in 46 U.S.C. 12113 to participate in certain North Pacific fisheries under the Council's jurisdiction and therefore are eligible to receive a certificate of documentation consistent with 46 U.S.C. 12113 and MARAD regulations at 46 CFR 356.47.

Under Amendment 97, vessel owners that choose to remove an Amendment 80 vessel would have the option of either assigning their Amendment 80 QS permit to a replacement vessel or permanently assigning their Amendment 80 QS permit to the License Limitation Program (LLP) license derived from the originally qualifying

Amendment 80 vessel. Under this second option, the holder of an Amendment 80 LLP/QS license could then assign the license to a vessel authorized to participate in the Amendment 80 sector. Amendment 97 would prohibit the use of a replacement vessel in an Amendment 80 fishery unless an Amendment 80 QS permit or an Amendment 80 LLP/QS license has been assigned to that vessel. Additionally, Amendment 97 would permit a person holding an Amendment 80 QS permit associated with a vessel that is permanently ineligible to re-enter United States fisheries to replace the vessel associated with the QS permit.

With an exception for the F/V GOLDEN FLEECE, Amendment 97 would extend to a replacement vessel all Gulf of Alaska (GOA) sideboard measures that are applicable to the originally qualifying Amendment 80 vessel being replaced. Additionally, Amendment 97 would extend to a replacement vessel authorization to conduct directed fishing for GOA flatfish species if the originally qualifying Amendment 80 vessel being replaced was authorized to conduct directed fishing for GOA flatfish species. This action would ensure that any vessel that replaces an Amendment 80 vessel eligible to conduct directed fishing for flatfish in the GOA will continue to be allowed to conduct directed fishing in the GOA flatfish fishery. The Council did not recommend any measures to address the potential expansion of the harvest by Amendment 80 replacement vessels in GOA flatfish fisheries because the Council determined that halibut prohibited species catch limits applicable to Amendment 80 replacement vessels adequately constrain harvest and because the annual harvest limits for many GOA flatfish species have not been fully harvested. Depending on the length overall of any replacement vessel for the F/V GOLDEN FLEECE, Amendment 97 would either extend the current sideboard

measures applicable to the F/V GOLDEN FLEECE or would impose the sideboard measures applicable to other Amendment 80 vessels. These provisions would continue to recognize the special standing that this vessel has received under Amendment 80 and its implementing regulations.

Amendment 97 would require all Amendment 80 replacement vessels to meet contemporary vessel construction standards in order to improve safety-at-sea for these vessels. Under Amendment 97, vessel owners applying to NMFS to replace their vessel would have to submit documentation demonstrating that their replacement vessel meets U.S. Coast Guard requirements applicable to catcher/processor vessels operating in the Amendment 80 sector or, if unable to meet these requirements, is enrolled in the U.S. Coast Guard Alternative Compliance and Safety Agreement (ACSA) program.

Amendment 97 would allow Amendment 80 vessels currently participating in the Amendment 80 program to replace other Amendment 80 vessels. However, in order to be used as an Amendment 80 replacement vessel, the currently participating Amendment 80 vessel would have to demonstrate compliance with the U.S. Coast Guard requirements or participate in the ACSA program.

Amendment 97 would restrict the use of replaced vessels that are not used as Amendment 80 replacement vessels. For replaced vessels that are not assigned to an Amendment 80 fishery, e.g., that are not used as Amendment 80 replacement vessels, Amendment 97 would establish a catch limit of zero metric tons for all BSAI and GOA groundfish fisheries. A catch limit of zero metric tons for all BSAI and GOA groundfish fisheries would effectively prohibit the vessel from being used to fish in any BSAI or GOA groundfish fishery. This provision would prevent the use of replaced vessels that

have substantial fishing capacity from entering into other BSAI or GOA fisheries. The Council was concerned about the highly destabilizing effect of increased fishing capacity and the resulting rapid pace of harvest if replaced vessels entered other BSAI and GOA fisheries.

Finally, Amendment 97 would amend the FMP to provide a brief summary of Amendment 93 to the FMP. This summary was inadvertently omitted from Amendment 93. To correct this omission, Amendment 97 would insert a brief summary of Amendment 93 in Appendix A to the FMP.

Public comments are being solicited on proposed Amendment 97 to the FMP through the end of the comment period (see DATES). NMFS intends to publish in the Federal Register and seek public comment on a proposed rule that would implement Amendment 97, following NMFS' evaluation of the proposed rule under the Magnuson-Stevens Act. Public comments on the proposed rule must be received by the end of the comment period on Amendment 97 to be considered in the approval/disapproval decision on Amendment 97. All comments received by the end of the comment period on Amendment 97, whether specifically directed to the FMP amendment or the proposed rule, will be considered in the FMP amendment approval/disapproval decision.

Comments received after that date will not be considered in the approval/disapproval decision on the amendment. To be considered, comments must be received, not just postmarked or otherwise transmitted, by the last day of the comment period.

Authority: 16 U.S.C. 1801 et seq.

Dated: March 1, 2012.

Steven Thur,
Acting Director,
Office of Sustainable Fisheries,
National Marine Fisheries Service.

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